growth is due to deregulation;27/ thus, so the reasoning goes, the Commission had better take a light-handed view of its regulatory responsibilities or it will cause this growth to diminish.28/ Time Warner Entertainment Company, L.P. ("Time Warner"), for example, cites a Dr. Kelley for the proposition that "[g]overnment intervention in cable television carries with it the potential to do significant harm to an industry that has been performing quite well along a number of different public policy dimensions."29/

There are several answers to these contentions, in addition to the obvious one that Congress has required "reasonable" rates and any approach that achieves less than that is a violation of the Cable Act. The expansion of the cable industry was not limited to the post-deregulation era; rather there was considerable expansion of the industry both before and after the 1984 Act, and there is no evidence -- only self-serving ipse dixits from the cable operators -- that but for deregulation, the post-1984 growth would not have occurred. A good case can be made that effective regulation will be a spur to growth at this time since the concerns of many potential cable customers regarding

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27/ E.g., NCTA Comments, p. 4; CIC Comments, p. 3-4.

28/ Another code word for this same concept is "flexibility," which permeates the comments of many of the cable companies. See, e.g., CIC Comments, passim.

29/ Comments of Time Warner ("Time Warner Comments"), p. 14.

excessive rates should be allayed by the Congressional mandate that rates be "reasonable." In any event, there is no reasonable basis for concluding that effective regulation will stymie growth in the industry, and the Commission should not be cowed by such thinly veiled threats.

With regard to the benchmark approach, which seems to be favored by almost all commenters, though for very different reasons, the cable companies maintain that the benchmark should "in almost all cases, [ ] cover the costs -- plus a reasonable profit -- of any service that the operator might choose to provide, and any facilities that might be used to provide such services."30/ Thus, under this approach, not only would the benchmark rate cover the costs of most operators, but in addition, those operators with still higher costs would have the option to seek rate relief.

The Coalition urges the Commission to reject this approach. The purpose of this exercise is not to rationalize the monopoly profits of cable operators in non-competitive service areas, but rather to reduce those very rates to reasonable levels. That can only be accomplished by adopting benchmark rates that reflect costs that a prudent operator would incur in a competitive marketplace. The ultimate question that the Commission must continue to ask itself is whether the result that it is sanctioning

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30/ NCTA Comments, p. 11.

would be the likely result if the affected operators were functioning in a workably competitive industry, keeping in mind that in a workably competitive industry companies strive to keep costs down in order to increase market penetration. The purpose of benchmarking must not be to sanction existing excessive rates; but rather to simulate competitive rates.

Not surprisingly, the cable companies very much support the Commission's proposal that cable companies be permitted to seek rates above the benchmark.31/ The Coalition also supports this approach as being fair to those operators that can show that they are entitled to such higher rates, but it is important to keep in mind that this "escape valve" goes hand-in-glove with cost-based benchmarking that keeps rates at reasonable levels, whereas the cable companies seem to envision establishing high benchmarks at the outset, with the possibility of still higher rates available to some operators.32/

31/ E.g., NCTA Comments, pp. 39 et seq.

32/ Regarding the procedures for such proceedings, the Coalition rejects the suggestion that cable operators should be able to present whatever data they want, with the burden on the franchising authority to rule on the request within a very short time period. (E.g., NCTA Comments, pp. 40-41.) The Coalition urges that the Commission establish minimum uniform standards with which the operators must comply and that the franchising authority be given sufficient time to review the data, to inquire regarding it (which inquiry may or may not require a formal hearing), and to render a reasoned decision regarding the merits of the operator's proposal.

Also not surprisingly, the cable companies do not suggest that the franchising authorities have the reciprocal right to seek to lower a cable company's rates below the benchmark where the facts justify that result. The Coalition urges that this right of franchising authorities to initiate such proceedings is essential to a fair and balanced ratemaking scheme.

One of the points made by Coalition in its initial comments was the critical need for accurate and uniform data -- that without such data, effective regulation is not possible. Ironically, one of the reasons posited by the cable companies for opposing cost-of-service regulation is that "there is, in the cable industry, no existing uniform system of accounting."33/ The Coalition urges the Commission not to use this excuse as the reason for avoiding effective regulation but rather to recognize that this excuse must be quickly removed by the collection of the needed data. A further irony of the industry position is that while they strenuously urge the Commission not to engage in cost-of-service regulation for a host of reasons, including the data gap problem, they have no compunction (as noted above) in urging that operators be permitted to make a cost-of-service showing for higher than benchmark

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33/ NCTA Comments, p. 13; see id. at p. 27.

rates;34/ apparently, compiling and submitting cost-of-service data is not a problem for cable operators if they believe it will result in a rate increase, but heaven forbid that such data be gathered in order to set reasonable cost-based benchmark rates from the outset!

Another example of the flawed logic of the cable operators is found in the following syllogism:

> To require systems either to have established the highest permissible rates at the outset or to forgo any necessary rate increases up to the benchmark levels would be unfair to those systems that charged rates below the benchmark level. A system whose rates were above the benchmark could presumably have its rates reduced by city regulators only to the benchmark level, where the rate would be presumed reasonable. But a system whose rates were below the benchmark would be prohibited from raising its rates to the same benchmark level. [35/]

The flaw in the syllogism is obvious: the benchmark must not be considered a floor for cable rates; rather, franchising authorities must have the right to initiate proceedings against those companies whose costs do not justify charging the benchmark. With this procedure in place, then the self-proclaimed unfairness of requiring that cable companies not increase their rates to the benchmark level disappears. Again, it is important to keep in mind that the purpose of

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34/ Continental Comments, p. ii: "While cost of service regulation is not desirable as a broad regulatory tool, it must remain available as a safety valve against confiscation."

35/ NCTA Comments, p. 29 (emphasis in original).

the Cable Act is to achieve "reasonable" rates, and reasonableness is not ultimately determined by whether rates are currently above or below some necessarily arbitrary benchmark.

While the Coalition is generally opposed to automatic passthroughs, since the fact of a rising cost component says nothing about whether the unit cost is increasing,36/ the Coalition believes that the cable companies have made a valid point regarding the treatment of government-related expenses like franchising fees, taxes, and the like.37/ It makes sense to remove these costs from the benchmarking approach and to permit separate treatment so that no operator either is penalized or experiences a windfall as the result of the treatment of such costs by various jurisdictions.

In its initial comments, the Coalition indicated (i) that it did not believe that there is sufficient competition in the industry to warrant using competitive rates exclusively for purposes of benchmarking but (ii) that the Commission should collect such information in order to

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36/ In addition, we note the inconsistency on the part of cable operators (e.g., CIC Comments, p. 22) that eschew cost of service regulation because it assertedly provides perverse incentives and yet maintain that they should be able to track costs (a deviation from true cost of service regulation, which deviation does indeed provide perverse incentives in terms of cost minimization).

37/ E.g., NCTA Comments, pp. 42-43; CIC Comments, p. 17.

assist it in establishing cost-based benchmarks. The cable operators oppose using competitive information on the ground that "[i]t is widely recognized that at the present time systems in overbuild situations do not necessarily reflect a true rate level but, rather, rates which are reflective of immature marketplace conditions."38/ CIC cites no authority for its "widely recognized" view regarding the nature of competitive rates, and the Coalition would continue to urge the Commission to collect and use this data except in those instances (if any) where the industry can show that the rates are not reflective of true competitive forces. The assumption, however, must be that such rates, which the Commission is prevented from regulating under the Cable Act because they are competitive (and hence deemed reasonable), are instructive for establishing reasonable benchmark rates.

IV. COMPLAINT PROCEDURES FOR CABLE PROGRAMMING SERVICES

Most of the initial comments submitted by the cable industry emphasize the need to "streamline" the complaint procedures for challenging unreasonable cable programming rates.39/ The primary putative concern raised by the

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38/ CIC Comments, p. 16 n. 14 (emphasis added).

39/ See, e.g., Time Warner Comments, p. 45, urging the Commission to adopt "simple and streamlined procedures;" CIC Comments, p. 73, urging the adoption of "procedures to determine expeditiously whether a rate is unreasonable."

industry is the need to establish a "threshold" pleading requirement which complainants must meet in order for the Commission to consider their complaint. The Coalition submits that such stated "concerns" are an effort to divert attention from Congress' goal in enacting the complaint provisions of providing a meaningful forum for the complaints of consumers and local franchising authorities.

Several cable industry commenters suggest that the Commission adopt procedures whereby a complaint will be considered sufficient only if it alleges that a cable operator's rates are above an established benchmark rate; if the operator's rates are in fact within the benchmark, the complaint will not be considered. For example, CIC suggests that "[r]ates that fall at or below benchmarks can be easily identified and complaints alleging that those rates are unreasonable can be quickly dismissed."40/ Time Warner contends that the Commission "should automatically dismiss any complaint regarding the rates of any cable system which lies within the [industry] norm."41/

This approach violates the Act's mandate that the Commission prescribe criteria for identifying "rates for cable programming services that are unreasonable."42/ As noted by the Coalition in its initial comments, there is no

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40/ CIC Comments, p. 73.

41/ Time Warner Comments, p. 46.

42/ Cable Act, Section 623(c)(1)(A) (emphasis added).

guarantee that rates within an established benchmark will be reasonable.43/ Quite to the contrary, since a benchmark is nothing more than an average, there will by definition be systems whose costs are above the benchmark and systems whose costs are below the benchmark. Consumers and local franchising authorities must therefore have the right to challenge an operator's rates that are within an established benchmark as being unreasonable.

Using a benchmark approach to determine the sufficiency of complaints not only violates Congress' directive that unreasonable rates may be challenged, but it also deprives consumers and local franchising authorities of the right granted in the Cable Act to have their complaints heard by the FCC. In its zeal to devise complaint procedures that are "simple and expeditious,"44/ the FCC has lost sight of the Congressional directive to fashion procedures that are "fair and expeditious."45/

The FCC notes in its NPRM that "under a benchmark approach, an operator would be required to respond only if the allegations are that rates were outside the benchmark."46/ Not surprisingly, the cable industry agrees

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43/ Initial Comments, pp. 27-31.

44/ NPRM, p. 50.

45/ Cable Act, Section 623(c)(1)(B) (emphasis added).

46/ NPRM, p. 53.

with the Commission's suggested benchmark approach. For example, CIC proposes the following procedure:

> If the staff ... determines that the rates are within the benchmark, no further response by the operator should be required and the complaint would be dismissed.
>
> Upon a determination that the rates for programming services exceed a relevant benchmark, an operator should be given the opportunity to demonstrate that the rates are nonetheless not unreasonable.[47/]

Is it fair that a cable operator may respond to a complaint that its rates are above a benchmark by producing data justifying its rates, but to shelter the same cable operator from having to respond to a complaint that its rates, while within a benchmark, are nonetheless unreasonable, solely in the name of expedition? The Coalition submits that such a complaint procedure, while certainly expeditious and solicitous of cable operators concerns that they not be required to respond to too many complaints, would not be fair to the consumers and local franchising authorities for whom Congress mandated the availability of complaint procedures.

Congress clearly contemplated that the complaint process would provide consumers and local franchising authorities with a meaningful mechanism for challenging unreasonable cable programming rates. Congress rejected formalistic complaint procedures such as requiring that a

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47/ CIC Comments, p. 74.

complaint demonstrate a prima facie case, which would only serve to place roadblocks in the path of complainants.48/ Congress intended to "allow consumers to simplify the process of filing complaints concerning unreasonable rates."49/ Congress' intent in requiring simplified complaint procedures was thus not to ensure that cable operators be protected from consumers' complaints, but to ensure that the process would be simple enough to enable consumers to exercise their right to file a complaint with the FCC on their own initiative and without the assistance of counsel.

The Coalition supports, with some modifications, the Commission's suggestion in its NPRM that a complainant "be required to allege that cable rates have risen unreasonably within a given period and give the specific range of rates and years involved ... that the complainant was a subscriber of a cable system named in the complaint, and also state the name of the franchising authority."50/ The FCC should adopt regulations providing flexible standards by which a consumer may allege that cable rates are unreasonable. For example, it should be sufficient to allege the rates currently charged by the complainant's cable system, the amount such rates have increased from any given period, and

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48/ Conference Report, p. 64.

49/ Id.

50/ NPRM, p. 51.

the rates charged by other cable operators in the area near complainant's residence.51/ Alternatively, it should be sufficient to allege the current rates charged and how much those rates exceed any relevant established benchmark rate. Once a complainant has made a sufficient allegation that a cable operator's rates are unreasonable, the burden should shift to the cable operator to prove that its rates are reasonable.

The FCC's NPRM also sought comment on whether consumers should be required to file complaints with their local franchising authority, rather than directly with the FCC.52/ The NCTA supports this approach, suggesting that consumers be required "first to present their complaint to a franchising authority," who "could seek from the operator its benchmark and evaluate the complaint to determine whether the rate is presumptively 'unreasonable.'"53/ The Coalition submits that such a screening procedure would violate the Cable Act's explicit directive that both consumers and local franchising authorities be given direct access, via the filing of a complaint, to the FCC. The Act

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51/ Alternatively, the Commission could adopt the procedures suggested by the NCTA for cable operators to demonstrate that their costs justify rates higher than the benchmark: complainants "should be permitted to make whatever showing they choose in order to demonstrate" that a cable system's rates are unreasonable. NCTA Comments, p. 40.

52/ NPRM, pp. 51-52.

53/ NCTA Comments, pp. 75-76.

requires the FCC to adopt "procedures for the receipt, consideration, and resolution of complaints from any subscriber, franchising authority or other relevant State or local government entity."54/

In its NPRM, the FCC expressed an undue amount of concern that the procedures adopted "not permit complaints that are frivolous or lack any serious substantive allegation to proceed."55/ The industry shares the FCC's concern. The NCTA frets that "even system operators with 'reasonable' rates may well face millions of complaints from subscribers."56/ Such "floodgates of litigation" arguments are nothing more than a smokescreen, and are easily dismissed. The transactional costs involved in filing and prosecuting a complaint will mitigate against the filing of frivolous complaints.

Moreover, to the extent there is a substantial number of complaints challenging unreasonable rates, such a result is exactly what Congress intended when it mandated that consumers and local franchising authorities be given the right to file complaints with the FCC challenging unreasonable cable programming rates. If Congress had intended to curb the number of complaints, it could have done so. In fact, the legislative history clearly

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54/ Cable Act, Section 623(c)(1)(B) (emphasis added).

55/ NPRM, p. 51.

56/ NCTA Comments, p. 75.

establishes that Congress had the opposite intent. The Conference Report explicitly states that "[t]he conference agreement permits subscribers, as well as franchising authorities or other relevant State or local government entities, to file complaints."57/

The Commission's suggested thirty day limitation on filing complaints following a change in rates is not sufficient to allow meaningful participation from consumers and local franchising authorities in the complaint process. The cable industry urges the FCC to adopt an unreasonably short limitations period while at the same time insisting that complaints regarding rates be supported by specific allegations of unreasonableness. The industry cannot have it both ways. Thirty days is simply not long enough for complainants to acquire the information necessary to make an informed complaint challenging the reasonableness of cable programming rates. The Coalition suggests that the Commission adopt a 120 day limitation period. Alternatively, the Commission must establish rules which permit liberal opportunities for consumers and franchising authorities to cure insufficient complaints while, at the same time, the timeliness of the complaint will be determined from the date of initial filing.

The "uncertainty over whether a rate increase could go forward" about which the NCTA frets will not materialize.

57/ Conference Report, p. 64.

As suggested by the Commission, a rate increase could go into effect subject to refund.58/ Uncertainty in such circumstances would obtain only if the proposed rate increase were excessive. Such uncertainty would be a necessary element of ensuring that rates are reasonable.

In addition to their insistence that the complaint procedures be designed to throw as many roadblocks in the path of complainants as possible, the cable industry also urges the Commission to adopt refund policies that would diminish the reward of a successful challenge to the reasonableness of rates. Almost without exception, the cable industry commenters argue that it would be administratively impossible to make refunds to those consumers who paid unreasonable rates.59/ The industry urges that the procedure suggested by the Commission in its NPRM60/ as an alternative to making refunds directly to affected consumers -- ordering prospective reductions in bills sent to the class of consumers affected by the unreasonable rates -- be adopted in all instances where refunds are ordered.

58/ NPRM, p. 54.

59/ See, e.g., CIC Comments, p. 82 ("it would be almost impossible to determine who paid the overcharge"); NCTA Comments, p. 77 ("it may well be administratively difficult for operators to keep track of previous subscribers").

60/ NPRM, p. 54.

The industry offers no support for its claim that paying refunds to affected customers will be administratively impossible. The Commission should disregard the unsupported and self-serving contentions of the industry and require that refunds be made to the customers who paid unreasonable rates in all instances except those where a cable operator is able to demonstrate actual administrative impossibility. Ordering prospective pro-rata reductions in rates does not have the same disciplinary effect as ordering refunds to affected customers, since when a company pays a refund, the payment is generally reflected in a decrease in earnings. A threatened reduction in earnings is a powerful disincentive to charging unreasonable rates. Furthermore, a prospective pro-rata reduction in rates does not return monies to the customers actually overcharged. To the maximum extent possible, the Commission should require cable operators to match refunds to those persons who bore the financial burden of the excessive rates.

V. THE CABLE ACT SETS FORTH THE MINIMUM REQUIREMENTS FOR THE BASIC SERVICE TIER AND DOES NOT PREEMPT LOCAL FRANCHISING AUTHORITIES AND CABLE OPERATORS FROM EXPANDING THE SERVICES PROVIDED IN THE BASIC SERVICE TIER BEYOND THE STATUTORY MINIMUM

Section 3 of the Cable Act describes, inter alia, the regulation of the basic service tier. The Cable Act states that the basic service tier "shall, at a minimum, consist

of" (1) all signals carried in fulfillment of the requirements of Sections 614 and 615; (2) any public, educational and governmental access programming required by the franchise of the cable system; and (3) any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.61/ That same section also states that a cable operator may add additional video programming signals or services provided on the basic service tier; however, any such signals or services shall be provided subject to rate regulation.62/

Thus, the statute establishes the minimum requirements for the basic tier and permits the addition of signals and services to that tier provided that any and all services in the basic tier are subject to rate regulation under the regulations to be promulgated by the FCC here. Despite this unequivocal language, Time Warner argues that "[t]he Commission should thus declare any local requirements which specify either the content composition or a fixed number of channels for the basic tier to be preempted."63/ Time Warner cites no support for its request, other than a short, self-serving tirade concerning its belief that "cable

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61/ Section 623(b)(7).

62/ Id.

63/ Time Warner Comments, p. 13.

operators should not be bound by anachronistic requirements for a 'fat' basic tier."64/

Time Warner's comments raise an important issue concerning the viability of existing franchise agreements. While Time Warner seeks to twist the Cable Act to its own

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64/ Id. Time Warner does not mind if cable operators are tied to "fat" basic service rates, however. Time Warner favors grandfathering basic rate agreements between a franchising authority and a cable operator, even if the rates are above the rates that might result under the Commission's rate formula here: "The purpose of grandfathering existing basic rate agreements is to exempt such agreements from the rate regulation rules implemented pursuant to Section 623 because those basic cable rates have already been regulated, via agreement, where the cable system that is a party to the agreement was not subject to effective competition under the Commission's regulations in effect when the agreement was concluded." Time Warner Comments, pp. 93-94.

Thus, Time Warner advocates the "heads operators win, tails franchising authorities lose" approach to existing franchise agreements. According to Time Warner, the statutory requirements concerning the contents of the basic service tier (which as discussed above are only minimum requirements) must be applied even where an existing franchising agreement provides for a basic service tier which contains more signals and services than the minimum set forth in the Cable Act. At the same time, Time Warner advocates that an existing franchise agreement should control for rate purposes, even where the rate is above a reasonable rate.

Time Warner has it exactly wrong. As discussed here and in the Coalition's initial comments, Congressional intent concerning rates for basic cable service is that both existing and future rates must be reasonable. On the other hand, with respect to such items as composition of the basic service tier and customer service standards, Congress has provided for minimum standards. Congress did not say that franchising authorities could not adopt more stringent standards and indeed specifically provided the authority for franchising authorities to do so in both instances.

advantage to override what it considers to be onerous provisions in existing franchise agreements, neither the Cable Act nor the legislative history indicate that that was Congress' intent. Instead, it is clear that the Cable Act establishes minimum requirements in a number of areas, such as composition of the basic service tier and customer service standards, and that it does not eviscerate franchise agreements which contain requirements in excess of these standards. The only area in which an existing franchise agreement may be preempted is in the area of the rates for the basic tier of service for which Congress has required regulation; however, the franchise would only be preempted in those circumstances where rates for the basic service tier would exceed a just and reasonable rate as determined by the FCC and the franchising authority.

Time Warner's comments evidence a basic misunderstanding of the Cable Act that is shared by many of its colleagues. It tends to view the Cable Act as a cable operator rather than a consumer protection statute. Had Congress been satisfied with the cable industry's conduct, there would have been no need for the Cable Act. Sadly, such was and is not the case; as Congress specifically found, since the so-called deregulation of the cable industry in 1984, rates to consumers have increased dramatically. The Cable Act is the Congressional response to the many ills suffered by consumers at the hands of

certain cable operators, and particularly at the hands of those cable operators which are not subject to competitive pressures.

The Congressional response to this state of affairs was to establish a basic tier of service which must be offered by all cable operators and which, absent effective competition as defined by the Cable Bill, shall be regulated by a certified franchising authority subject to the regulations promulgated by the Commission. The Cable Act also established the minimum requirements for the signals and services to be included in the basic service tier; however, it clearly envisioned the possibility that other services might be added to the basic service tier and regulated in the same fashion as the statutorily required basic tier services.

There is absolutely no legislative history which supports the notion that Congress intended to limit the basic service tier solely to those signals and services specifically enumerated in the Cable Act, nor is there any such history which supports the notion that Congress intended to limit the ability of a franchising authority to negotiate a franchise agreement with its cable operator which required the addition of one or more signals or services to the basic service tier in its community. The franchise agreement is the basic contract between a franchising authority and a cable operator; as with all

contracts, it is subject to the give and take of negotiation. The franchising authority may be willing to make other non-rate concessions in return for additions to the basic service tier.

Congress did not intend to undermine a franchising authority's ability to negotiate the terms of the franchise agreement; it simply sought to establish a minimum number of signals and services that must be included in the basic service tier. It would be inherently unfair, not to mention unlawful, to permit a cable operator to add additional video programming signals or services to the basic service tier (as set forth in the Cable Act), but to forbid the franchising authority the same right. In fact, Congressional policy as set forth in the Act mandates, inter alia, that (1) consumer interests in the receipt of cable service are to be protected and (2) cable operators are not to have undue market power vis-a-vis consumers.65/ Yet Time Warner's approach would deprive consumers of their interest in receiving the basic services that they currently receive as a result of a franchise agreement; moreover, it would permit the cable operator to cut current services to subscribers.

Time Warner's suggestion, if adopted, would undermine the purposes of the Cable Act and unlawfully deprive franchising authorities of their rights under existing

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65/ Cable Act, Sections 2(b)(4) & (5).

franchise agreements and their ability to negotiate the terms of future franchise agreements. The Commission should make clear that franchising authorities are free to negotiate any and all terms of their franchise agreements with their cable operators, provided that the agreements meet the minimum standards set forth in the Cable Act and any Commission regulations which lawfully implement the provisions of that Act. Moreover, the Commission should make clear that existing franchise agreements remain valid as long as they meet this same standard.

VI. THE SCOPE OF THE FRANCHISING AUTHORITY'S REGULATORY AUTHORITY

A. The Franchising Authority Should Not Be Required To Notify A Cable Operator Of Its Intention To Seek Certification Prior To Filing Its Request With The Commission.

Time Warner suggests that franchising authorities should be required to advise cable operators 10 days before filing a request for certification with the Commission.66/ According to Time Warner, this will afford a franchising authority and the cable operator the opportunity to address certain issues prior to the filing, and will enable cable operators to challenge the jurisdiction of the local cable authority to regulate cable rates.

66/ See Time Warner Comments, p. 29.

The procedure suggested by Time Warner is unnecessary and complicates what should, in most cases, be a simple and straightforward process. The Commission properly concluded that initial certification could be accomplished by way of a simple form on which the franchising authority would state that (1) it will adopt and administer regulations consistent with the FCC's regulations concerning basic service tier rates; (2) it has the authority to adopt and the personnel to administer such regulations; and (3) the procedural laws and regulations applicable to rate regulation proceedings provide a reasonable opportunity for consideration of the views of interested parties.67/ The Commission also properly concluded that the determination of whether a cable system is subject to effective competition should be made in the first instance by the franchising authority rather than the FCC.

There is no reason to complicate unnecessarily this procedure. Cable operators are most likely already aware that they are candidates for regulation by a franchising authority; to the extent they wish to discuss any issue concerning the certification of the franchising authority, they need only to pick up the telephone.

The statute itself specifies the procedure to be followed upon filing of the certification; the certification

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67/ These are the requirements for certification required by the Cable Act. See Section 623(a)(3).

shall be effective 30 days after it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity to comment, that the franchising authority does not meet one or more of the standards set forth above.68/ Thus, the cable operator will be given an opportunity to challenge the certification and the initial determination that competition does not exist. A ten day prior notice requirement will not augment or facilitate the process established by the Cable Act; it would simply place an additional burden on a franchising authority with no valid reason for doing so. Cable operators are given ample opportunity to challenge certification under the act. Moreover, the Coalition suspects that challenges to certification applications will be few and far between; there is no reason to assume that a host of unqualified franchising authorities will nevertheless seek to obtain certification.

B. The Party Challenging Either The Certification Or The Determination That A Cable Operator Is Not Subject To Effective Competition Has The Burden Of Proof.

Time Warner also suggests that proceedings challenging a certification request should be conducted de novo. It states that the Commission will have no opportunity to review the substance of the representations or the analysis

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68/ Id.

submitted with the certification applications.69/ The Commission should reject this request and further state that the party challenging the certification, as well as any initial finding that effective competition does not exist, bears the burden of proof.

Placing the burden of proof on the challenging party is consistent with both the requirements of the Cable Act and the Commission's desire for simplicity in the regulation process. The Commission has correctly determined that the initial certification process can be accomplished by use of a form; indeed, the statutory requirements for certification are neither complex nor detailed. Any franchising authority which files a certification is entitled to a presumption that the statements contained therein are true; hence, the certification application is prima facie evidence that the franchising authority meets the requirements for certification.70/

69/ Time Warner Comments, p. 30.

70/ In fact, the Cable Act itself provides the basis for this presumption. A certification filed by a franchising authority "shall be effective 30 days after the date on which it is filed" unless and until the Commission finds that certification is inappropriate. Section 623(a)(4). And even in the case where the certification is denied, the Commission "shall notify the franchising authority of any revisions or modifications necessary to obtain approval." Id. Hence, the clear presumption is that the filing of a certification constitutes a prima facie case that the franchising authority may regulate rates for the basic service tier.